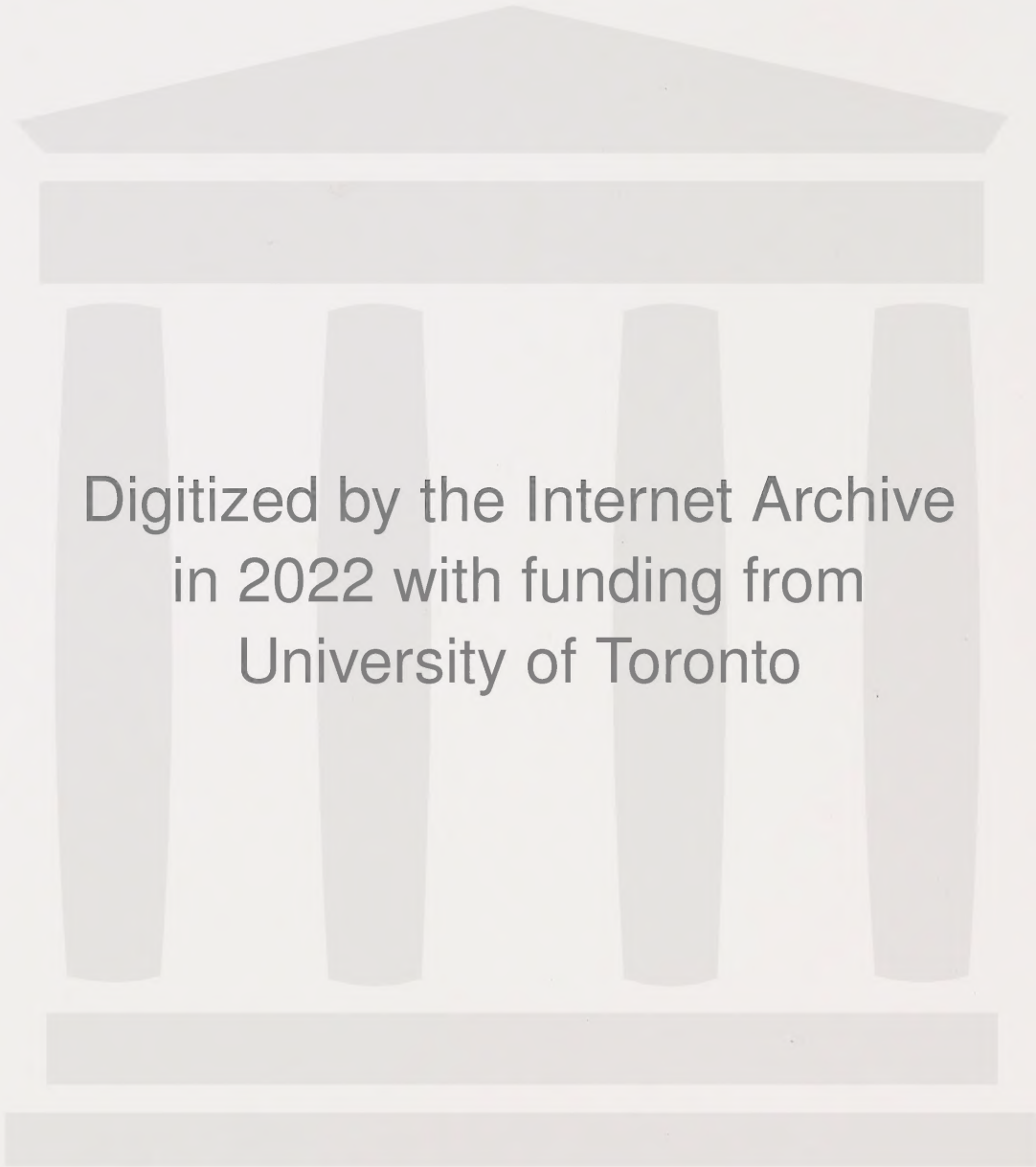
Legislative Proposals, Draft Regulations and Explanatory Notes Relating to the Excise Tax Act

Published by
The Honourable Ralph Goodale, P.C., M.P.
Minister of Finance

November 2005

Canada



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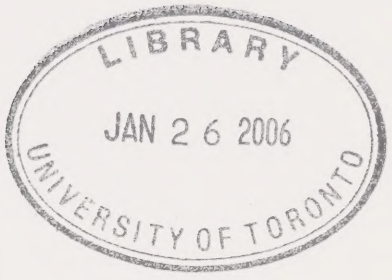

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Draft Legislation Amending the Excise Tax Act

1. (1) The definition "closely related group" in subsection 123(1) of the *Excise Tax Act* is replaced by the following:

"closely related group" « *groupe étroitement lié* »

"closely related group" means a group of corporations, each member of which is a registrant resident in Canada and is closely related, within the meaning assigned by section 128, to each other member of the group, and for the purposes of this definition,

(*a*) a non-resident insurer that has a permanent establishment in Canada is deemed to be resident in Canada, and

(*b*) a credit union and a member of a mutual insurance group are each deemed to be a registrant.

(2) Subparagraph (iii) of the description of A in paragraph (*a*) of the definition "basic tax content" in subsection 123(1) of the Act is replaced by the following:

(iii) the tax under section 165 that would have been payable by the person, in respect of the last acquisition of the property by the person or in respect of improvements to the property acquired by the person after the property was last acquired or imported by the person, in the absence of subsection 153(4), section 167, section 167.11 in the case of property acquired under an agreement for a qualifying supply (as defined in that section) that was not, immediately before that acquisition, capital property of the supplier or the fact that the property or improvements were acquired by the person for consumption, use or supply exclusively in commercial activities,

(3) Subparagraph (iv) of the description of J in paragraph (*b*) of the definition "basic tax content" in subsection 123(1) of the Act is replaced by the following:

(iv) the tax under section 165 that would have been payable by the person, in respect of improvements to the property acquired by the person after the property was brought into the participating province, in the absence of subsection 153(4), section 167, section 167.11 in the case of property acquired under an agreement for a qualifying supply (as defined in that section) that was not, immediately before that acquisition, capital property of the supplier or the fact that the improvements were acquired by the person for consumption, use or supply exclusively in commercial activities, or

(4) The definition "financial service" in subsection 123(1) of the Act is amended by adding the following after paragraph (*r.1*):

(*r.2*) a debt collection service, rendered under an agreement between a person agreeing to provide, or arranging for, the service and a particular person other than the debtor, in respect of all or part of a debt, including a service of attempting to collect, arranging for the collection of, negotiating the payment of, or realizing or attempting to realize on any security given for, the debt, but does not include a service that consists solely of accepting from a person (other than the particular person) a payment of all or part of an account unless

(i) under the terms of the agreement the person rendering the service may attempt to collect all or part of the account or may realize or attempt to realize on any security given for the account, or

(ii) the principal business of the person rendering the service is the collection of debt,

(5) The portion of the definition "qualifying subsidiary" in subsection 123(1) of the Act before paragraph (*b*) is replaced by the following:

"qualifying subsidiary" « *filiale déterminée* »

"qualifying subsidiary" of a particular corporation means another corporation not less than 90% of the value and number of the issued and outstanding shares of the capital stock of which, having full voting rights under all circumstances, are owned by the particular corporation, and includes

(*a*) a corporation that is a qualifying subsidiary of a qualifying subsidiary of the particular corporation,

(6) Subsection 123(1) of the Act is amended by adding the following in alphabetical order:

"Superintendent" « *surintendant* »

"Superintendent" means the Superintendent of Financial Institutions appointed pursuant to the *Office of the Superintendent of Financial Institutions Act*;

(7) Subsections (1) and (5) are deemed to have come into force on ANNOUNCEMENT DATE.

(8) Subsections (2), (3) and (6) are deemed to have come into force on June 28, 1999.

(9) Subsection (4) applies to a debt collection service rendered under an agreement for a supply if

(*a*) any consideration for the supply becomes due after ANNOUNCEMENT DATE or is paid after that day without having become due, or

(*b*) all of the consideration for the supply became due or was paid on or before that day unless the supplier did not, on or before that day, charge, collect or remit any amount as or on account of tax under Part IX of the Act in respect of the supply or in respect of any other supply that includes a debt collection service and that is made under the agreement.

2. (1) The portion of subsection 128(1) of the Act before subparagraph (*a*)(i) is replaced by the following:

Closely related corporation

128. (1) For the purposes of this Part, a particular corporation and another corporation are closely related to each other at any time if at that time

(*a*) not less than 90% of the value and number of the issued and outstanding shares of the capital stock of the other corporation, having full voting rights under all circumstances, are owned by

(2) The portion of subsection 128(1) of the Act after paragraph (*b*) is repealed.

(3) Subsections 128(2) and (3) of the Act are replaced by the following:

Corporations closely related to the same corporation

(2) If under subsection (1) two corporations are closely related to the same corporation, they are closely related to each other for the purposes of this Part.

Investment funds

(3) For the purposes of this section, an investment fund that is a member of a mutual insurance group is deemed to be a corporation.

(4) Subsections (1) to (3) are deemed to have come into force on ANNOUNCEMENT DATE.

3. (1) The definitions "qualifying group" and "specified member" in subsection 156(1) of the Act are replaced by the following:

"qualifying group" *« groupe admissible »*

"qualifying group" means

(*a*) a group of corporations, each member of which is closely related, within the meaning assigned by section 128, to each other member of the group; or

(*b*) a group of Canadian partnerships, or of Canadian partnerships and corporations, each member of which is closely related, within the meaning of this section, to each other member of the group.

"specified member" *« membre déterminé »*

"specified member" of a qualifying group means

(*a*) a qualifying member of the group; or

(*b*) a temporary member of the group during the course of the reorganization referred to in paragraph (*f*) of the definition "temporary member".

(2) Subsection 156(1) of the Act is amended by adding the following in alphabetical order:

"distribution" *« attribution »*

"distribution" has the meaning assigned by subsection 55(1) of the *Income Tax Act*.

"qualifying member" *« membre admissible »*

"qualifying member" of a qualifying group means a registrant that is a corporation resident in Canada or a Canadian partnership and

(*a*) that is a member of the group;

(*b*) that is not a party to an election under subsection 150(1); and

(*c*) all or substantially all of the property of which (other than financial instruments) was last manufactured, produced, acquired or imported by the registrant for consumption, use or supply exclusively in the course of commercial activities of the registrant or, if the registrant has no property (other than financial instruments), all or substantially all of the supplies made by the registrant are taxable supplies.

"temporary member" « *membre temporaire* »

"temporary member" of a qualifying group means a corporation

(*a*) that is a registrant;

(*b*) that is resident in Canada;

(*c*) that is a member of the group;

(*d*) that is not a qualifying member of the group;

(*e*) that is not a party to an election under subsection 150(1);

(*f*) that receives a supply of property made in contemplation of a distribution made in the course of a reorganization described in subparagraph 55(3)(*b*)(i) of the *Income Tax Act* from the distributing corporation referred to in that subparagraph that is a qualifying member of the group;

(*g*) that, before receiving the supply, does not carry on any business or have any property (other than financial instruments); and

(*h*) the shares of which are transferred on the distribution.

(3) The portion of subsection 156(1.1) of the Act before subparagraph (*a*)(i) is replaced by the following:

Closely related persons

(1.1) For the purposes of this section, a particular Canadian partnership and another person that is a Canadian partnership or a corporation are closely related to each other at any time if, at that time,

(*a*) in the case where the other person is a Canadian partnership,

(4) Clause 156(1.1)(*a*)(i)(B) of the Act is replaced by the following:

(B) a corporation, or a Canadian partnership, that is a member of a qualifying group of which the particular partnership is a member, or

(5) Clause 156(1.1)(*a*)(ii)(A) of the Act is replaced by the following:

(A) owns at least 90% of the value and number of the issued and outstanding shares, having full voting rights under all circumstances, of the capital stock of a corporation that is a member of a qualifying group of which the other person is a member, or

(6) The portion of paragraph 156(1.1)(*b*) of the English version of the Act before subparagraph (i) is replaced by the following:

(*b*) in the case where the other person is a corporation,

(7) Clause 156(1.1)(*b*)(i)(B) of the Act is replaced by the following:

(B) a corporation, or a Canadian partnership, that is a member of a qualifying group of which the particular partnership is a member, or

(8) The portion of subparagraph 156(1.1)(*b*)(ii) of the Act before clause (A) is replaced by the following:

(ii) not less than 90% of the value and number of the issued and outstanding shares, having full voting rights under all circumstances, of the capital stock of a corporation are owned by,

(9) Clause 156(1.1)(*b*)(iii)(B) of the Act is replaced by the following:

(B) a corporation, or a Canadian partnership, that is a member of a qualifying group of which the other person is a member, or

(10) Subsection 156(1.2) of the Act is replaced by the following:

Persons closely related to the same person

(1.2) If, under subsection (1.1), two persons are closely related to the same corporation or partnership, or would be so related if each member of that partnership were resident in Canada, the two persons are closely related to each other for the purposes of this section.

(11) Subsection 156(2) of the Act is replaced by the following:

Election for nil consideration

(2) For the purposes of this Part, if a specified member of a qualifying group elects jointly with another specified member of the group, every taxable supply made between them at a time when the election is in effect is deemed to have been made for no consideration.

Non-application

(2.1) Subsection (2) does not apply to

(*a*) a supply by way of sale of real property;

(*b*) a supply of property, or of a service, that is not acquired by the recipient for consumption, use or supply exclusively in the course of commercial activities of the recipient; and

(*c*) if the recipient of the supply is a temporary member, a supply that is not a supply of property made in contemplation of a distribution made in the course of a reorganization described in subparagraph 55(3)(*b*)(i) of the *Income Tax Act*.

(12) Subsections (1) to (10) are deemed to have come into force on ANNOUNCEMENT DATE.

(13) Subsection (11) applies to supplies made on or after ANNOUNCEMENT DATE.

4. (1) The Act is amended by adding the following after section 167.1:

Definitions

167.11. (1) The following definitions apply in this section.

"authorized foreign bank" « *banque étrangère autorisée* »

"authorized foreign bank" has the meaning assigned by section 2 of the *Bank Act*.

"foreign bank branch" « *succursale de banque étrangère* »

"foreign bank branch" means a branch as defined in paragraph (*b*) of the definition "branch" in section 2 of the *Bank Act*.

"qualifying supply" « *fourniture admissible* »

"qualifying supply" means a supply of property or a service made in Canada under an agreement for the supply (other than an agreement between a supplier that is a registrant and a recipient that is not a registrant at the time the agreement is entered into)

(*a*) that is made by a corporation resident in Canada related to the recipient;

(*b*) that is made after June 27, 1999, and before,

(i) if the Superintendent makes an order under subsection 534(1) of the *Bank Act* in respect of the recipient after the particular day on which the Act enacting this section receives royal assent but before the day that is one year after the particular day, the day that is one year after the day on which the Superintendent makes the order, and

(ii) in any other case, the day that is one year after the particular day; and

(*c*) that is received by a recipient that

(i) is a non-resident person,

(ii) is, or has filed an application with the Superintendent for an order under subsection 524(1) of the *Bank Act* to become, an authorized foreign bank, and

(iii) acquired the property or service for consumption, use or supply by the recipient for the purpose of the establishment and commencement of business in Canada by the recipient as an authorized foreign bank at a foreign bank branch of the authorized foreign bank.

Supply of assets

(2) For the purposes of this Part, if a supplier and a recipient of a qualifying supply make a joint election in accordance with subsection (7) in respect of the supply

(*a*) the supplier is deemed to have made, and the recipient is deemed to have received, a separate supply of each property and service that is supplied under the agreement for the qualifying supply for consideration equal to that part of the consideration for the qualifying supply that can reasonably be attributed to that property or service;

(*b*) any part of the consideration for the qualifying supply attributed to goodwill is deemed to be attributed to a taxable supply of intangible personal property unless section 167.1 applies to the qualifying supply; and

(*c*) subsections (3) to (6) apply to the supply of each property and service that is supplied under the agreement for the qualifying supply.

Effect of election

(3) For the purposes of this Part, if a supplier and a recipient make a joint election referred to in subsection (2) in respect of a qualifying supply made at any time,

(*a*) no tax is payable in respect of a supply of any property or service made under the agreement for the qualifying supply other than

(i) a taxable supply of a service that is to be rendered by the supplier,

(ii) a taxable supply of a service unless paragraph 167(1)(*a*) applies to the qualifying supply,

(iii) a taxable supply of property by way of lease, licence or similar arrangement,

(iv) if the recipient is not a registrant, a taxable supply by way of sale of real property,

(v) a taxable supply of property or a service, if the property or service was previously supplied under an agreement for a qualifying supply and, by reason of this subsection, no tax was payable in respect of that previous supply of property or service, and

(vi) a taxable supply of intangible personal property (other than capital property) if the percentage determined by the following formula is greater than 10%:

$$A - B$$

where

A is the extent (expressed as a percentage of the total use of the property by the supplier) to which the supplier used the property in commercial activities immediately before that time, and

B is the extent (expressed as a percentage of the total use of the property by the recipient) to which the recipient used the property in commercial activities immediately after that time;

(*b*) if in the absence of this subsection tax would have been payable by the recipient in respect of a supply of property made under the agreement for the qualifying supply, the property was capital property of the supplier, and the property is being acquired by the recipient for use as capital property of the recipient, the recipient is deemed to have so acquired the property for use exclusively in the course of commercial activities of the recipient;

(*c*) if despite this subsection tax would not have been payable by the recipient in respect of a supply of property made under the agreement for the qualifying supply, the property was capital property of the supplier, and the property is being acquired by the recipient for use as capital property of the recipient, the recipient is deemed to have so acquired the property for use exclusively in activities of the recipient that are not commercial activities; and

(*d*) if the recipient acquires under the agreement for the qualifying supply property of the supplier that was used by the supplier immediately before that time otherwise than as capital property of the supplier and, in the absence of this paragraph, tax would have been payable by the recipient in respect of the supply of the property, the recipient is deemed to have acquired the property for consumption, use or supply in the course of commercial activities and otherwise than as capital property of the recipient.

Basic tax content

(4) For the purposes of this Part, if a supplier and a recipient make a joint election referred to in subsection (2) in respect of a qualifying supply and, under the agreement for the qualifying supply, the supplier makes a supply of property that is, immediately before the time the qualifying supply is made, capital property of the supplier and, by reason of subsection (3), no tax is payable in respect of the supply of the property, the basic tax content of the property of the recipient at any time shall be determined by applying the following rules:

(*a*) if the last acquisition of the property by the recipient is the acquisition by the recipient at the time of the qualifying supply, any reference in paragraphs (*a*) and (*b*) of the definition

"basic tax content" in subsection 123(1) to the last acquisition or importation of the property by the person shall be read as a reference to the last acquisition or importation of the property by the supplier and not the acquisition by the recipient at the time of the qualifying supply;

(*b*) if the last supply to the recipient of the property is the supply to the recipient at the time of the qualifying supply, the reference in paragraph (*a*) of the definition "basic tax content" in subsection 123(1) to the last supply of the property to the person shall be read as a reference to the last supply of the property to the supplier and not the supply to the recipient at the time of the qualifying supply; and

(*c*) if, at any particular time on or after the last acquisition or importation of the property by the supplier and before the time of the qualifying supply, the property is acquired, imported or brought into a participating province or an improvement to the property is acquired, imported or brought into a participating province, any reference in paragraphs (*a*) and (*b*) of the definition "basic tax content" in subsection 123(1) to

(i) any acquisition, importation or bringing into a participating province of the property at that particular time or any acquisition, importation or bringing into a participating province of an improvement to the property at that particular time (in this paragraph referred to as the "actions") by the person shall be read as a reference to actions by the supplier and not actions by the recipient,

(ii) any tax that was payable, that would have been or would have become payable, that became payable or that had been payable by the person in respect of those actions at that particular time shall be read as reference to tax that was payable, that would have been or would have become payable, that became payable or that had been payable by the supplier and not by the recipient,

(iii) the person in respect of those actions at that particular time, or in respect of a particular status of the person at that particular time, shall be read as a reference to the supplier and not to the recipient,

(iv) any tax that the person was exempt from paying in respect of those actions at that particular time shall be read as a reference to tax that the supplier, and not the recipient, was exempt from paying,

(v) the person's percentage for a participating province determined for the purposes of subsection 225.2(2) for the person's taxation year that includes the time that an amount of tax became payable, or would have become payable by the person while the person was a selected listed financial institution, shall be read as a reference to the supplier's percentage for a participating province determined for the purposes of subsection 225.2(2) for the supplier's taxation year that includes the time that an amount of tax became payable, or would have become payable while the supplier was a selected listed financial institution, and

(vi) all amounts that the person was, or would have been, entitled to recover by way of rebate, refund, remission, or otherwise in respect of those actions at that particular time shall be read as a reference to all amounts that the supplier, and not the recipient,

was, or would have been, entitled to recover by way of rebate, refund, remission, or otherwise in respect of those actions.

Adjustment to net tax

(5) For the purpose of this Part, if a supplier and a recipient make a joint election referred to in subsection (2) in respect of a qualifying supply made before ANNOUNCEMENT DATE under an agreement for the qualifying supply and tax is paid by the recipient in respect of property or a service supplied under the agreement for the qualifying supply despite no tax being payable in respect of that supply as a result of subsection (3), except for the purposes of subsection (4), the tax is despite subsection (3) deemed to have been payable by the recipient in respect of the supply of the property or service, and in determining the net tax for the particular reporting period of the recipient in which the election is filed with the Minister, the recipient may deduct in determining the net tax of the recipient for the particular reporting period the total of all amounts each of which is an amount determined by the formula

A - B

where

A is the amount of tax paid, despite no tax being payable as a result of subsection (3), by the recipient in respect of the supply of the property or service made under the agreement for the qualifying supply; and

B is the total of

(*a*) all amounts each of which is an input tax credit that the recipient was entitled to claim in respect of the property or service supplied under the agreement for the qualifying supply;

(*b*) all amounts each of which is an amount (other than an amount determined under this subsection) that may be deducted by the recipient under this Part in determining the net tax of the recipient for a reporting period in respect of the property or service supplied under the agreement for the qualifying supply; and

(*c*) all amounts (other than amounts referred to in subparagraphs (*a*) and (*b*)) in respect of the tax paid and that may be otherwise recovered by way of rebate, refund, remission or otherwise by the recipient in respect of the property or service supplied under the agreement for the qualifying supply.

Limitation period where election

(6) If a supplier and a recipient make a joint election referred to in subsection (2) in respect of a qualifying supply, section 298 applies to any assessment, reassessment or additional assessment of an amount payable by the recipient in respect of a supply of property or a service made under the agreement for the qualifying supply, but the Minister has until the day that is four years after the later of the day on which the election under subsection (2) is filed with the Minister and the day the qualifying supply is made, to make any assessment, reassessment, or additional assessment solely for the purpose of taking into account any tax, net tax or any other amount payable by the recipient or remittable by the supplier in respect of a supply of property or a service made under the agreement for the qualifying supply.

Validity of election

(7) A joint election referred to in subsection (2) made by a supplier and a recipient in respect of a qualifying supply is valid if:

(*a*) the recipient files the election with the Minister in prescribed form containing prescribed information not later than the particular day that is the latest of

(i) if the recipient is

(A) a registrant at the time the qualifying supply is made, the day on or before which the return under Division V is required to be filed for the recipient's reporting period in which tax would, in the absence of this section, have become payable in respect of the supply of property or service made under the agreement for the qualifying supply, or

(B) not a registrant at the time the qualifying supply is made, the day that is one month after the end of the recipient's reporting period in which tax would, in the absence of this section, have become payable in respect of the supply of property or service made under the agreement for the qualifying supply,

(ii) the day that is one year after the day on which the Act enacting this section receives royal assent, or

(iii) any later day that the Minister may determine on application of the recipient;

(*b*) the qualifying supply is made on or before the day that is one year after the day on which the recipient received for the first time a qualifying supply in respect of which an election under subsection (2) has been made; and

(*c*) on or before the day the election referred to in subsection (2) is filed in respect of the qualifying supply, the recipient has not made an election under subsection 167(1.1) in respect of the supply.

(2) Subsection (1) is deemed to have come into force on June 28, 1999.

5. (1) Paragraph (*b*) of the description of A in subsection 193(1) of the Act is replaced by the following:

(*b*) the tax that is or would, in the absence of section 167 or 167.11, be payable in respect of the particular taxable supply, and

(2) Subsection (1) is deemed to have come into force on June 28, 1999.

6. (1) Section 205 of the Act is amended by adding the following after subsection (4):

Acquisition of asset

(4.1) Despite section 197, subsection 193(1) applies to the supplier of a supply of capital personal property that is made under an agreement for a qualifying supply (as defined in subsection 167.11(1)), and subsections 206(4) and (5) apply to the recipient of the supply of capital personal property, with any modifications that the circumstances require, as if the property were real property if

(*a*) the supplier and the recipient are both registrants at the time the qualifying supply is made and they make a joint election referred to in subsection 167.11(2) in respect of the qualifying supply;

(*b*) in acquiring the property, the recipient is deemed under subsection 167.11(3) to have acquired the property for use exclusively in commercial activities of the recipient; and

(*c*) immediately after the earlier of the time ownership or possession of the property is transferred to the recipient under the agreement for the qualifying supply, the property is for use by the recipient as capital property of the recipient but not exclusively in commercial activities of the recipient.

(2) Section 205 of the Act is amended by adding the following after subsection (5):

Acquisition of asset

(5.1) Despite section 197, subsection 206(2) applies to the recipient of a supply of capital personal property that is made under an agreement for a qualifying supply (as defined in subsection 167.11(1)), with any modifications that the circumstances require, as if the property were real property if

(*a*) the supplier and the recipient of the capital personal property are both registrants at the time the qualifying supply is made and they make a joint election referred to in subsection 167.11(2) in respect of the qualifying supply;

(*b*) in acquiring the property, the recipient is deemed under subsection 167.11(3) to have acquired the property for use exclusively in activities of the recipient that are not commercial activities; and

(*c*) immediately after the earlier of the time the ownership or possession of the property is transferred to the recipient under the agreement for the qualifying supply, the property is for use by the recipient as capital property of the recipient in commercial activities of the recipient.

(3) Subsections (1) and (2) are deemed to have come into force on June 28, 1999.

7. (1) Subsection 240(3) of the Act is amended by striking out the word "or" at the end of paragraph (*c*) and by adding the following after paragraph (*d*):

(*e*) is the recipient of a qualifying supply (as defined in subsection 167.11(1)), or of a supply that would be a qualifying supply if the recipient were a registrant, and the recipient files an election referred to in subsection 167.11(2) with the Minister in respect of the qualifying supply before the particular day that is referred to in paragraph 167.11(7)(*a*); or

(*f*) a corporation that would be a temporary member, as defined in subsection 156(1), in the absence of paragraph (*a*) of that definition.

(2) Paragraph 240(3)(*e*) of the Act, as enacted by subsection (1), is deemed to have come into force on June 28, 1999.

(3) Paragraph 240(3)(*f*) of the Act, as enacted by subsection (1), is deemed to have come into force on ANNOUNCEMENT DATE.

8. (1) Paragraph 257(1)(*b*) of the Act is replaced by the following:

(*b*) the tax that is or would, in the absence of section 167 or 167.11, be payable in respect of the particular supply.

(2) Subsection (1) is deemed to have come into force on June 28, 1999.

9. (1) Section 8.3 of Schedule VII to the Act is repealed.

(2) Subsection (1) is deemed to have come into force on ANNOUNCEMENT DATE.

Draft Regulations Amending the Closely Related Corporations (GST/HST) Regulations

Regulations Amending the Closely Related Corporations (GST/HST) Regulations

1. The portion of section 3 of the *Closely Related Corporations (GST/HST) Regulations* before paragraph (*a*) is replaced by the following:

3. For the purposes of paragraph 128(1)(*b*) of the Act, a corporation (in this section referred to as the "other corporation") is a prescribed corporation in relation to a particular corporation

2. Section 1 is deemed to have come into force on ANNOUNCEMENT DATE.

Draft Regulations Amending the Financial Services (GST/HST) Regulations

Regulations Amending the Financial Services (GST/HST) Regulations

1. Paragraphs 4(3)(*b*) and (*c*) of the *Financial Services (GST/HST) Regulations* are replaced by the following:

(*b*) a person that is a member of the same closely related group as a person at risk, if the recipient of the service is not the person at risk or another person that is a member of the same closely related group as the person at risk, or

(*c*) an agent, salesperson or broker who arranges for the issuance, renewal or variation, or the transfer of ownership, of the instrument for a person at risk or a person that is a member of the same closely related group as the person at risk.

2. Section 1 applies to supplies made on or after ANNOUNCEMENT DATE.

Explanatory Notes

These explanatory notes are provided to assist in an understanding of the proposed amendments to the *Excise Tax Act* and related regulations. These notes are intended for information purposes only and should not be constructed as an official interpretation of the provisions they describe.

Clause 1

Definitions

ETA
123(1)

Subsection 123(1) of the *Excise Tax Act* (the Act) contains definitions of words and expressions that apply throughout Part IX and in the Schedules thereto relating to the Goods and Services Tax / Harmonized Sales Tax (GST/HST).

Subclause 1(1)

Definition "closely related group"

ETA
123(1)

Existing definition "closely related group" refers to a group of corporations each member of which is closely related (generally, there is at least 90 per cent common ownership among the corporations) within the meaning of section 128 of the Act. Members of a closely related group may be eligible to make the elections under section 150 or 156 of the Act in respect of certain intra-group supplies or may, under subsection 228(7) of the Act, file joint applications to offset one corporation's refunds against another's tax owing.

Under the current legislation, there may be situations in which two corporations, that are part of a 90 per cent or more common ownership group and that are each a registrant resident in Canada, will not be part of a closely related group because one or more of the corporations that connect them in the ownership structure are either non-residents or non-registrants. An example of this would be two resident and registrant corporations (CanCo1 and 2) each of which is 100 per cent owned by corporations (NR1 and NR2), that are both non-residents and non-registrants, with NR1 and NR2 in turn being 100 per cent owned by another non-resident non-registrant corporation (NR3). In this case, CanCo1 and CanCo2 are not closely related under section 128, and consequently not part of a closely related group, because NR1 and NR2 are not "qualifying subsidiaries" (as defined in subsection 123(1) of the Act) of NR3 as they are not resident in Canada. Also, subsection 128(2) does not assist CanCo1 and CanCo2 to be closely related as it does not allow the fact that NR1 and NR2 are not registrants to be ignored. As a result, while CanCo1 and CanCo2 are both registrants and residents in Canada and are part of a 90 per cent or more common ownership group, they are not part of a closely related group (as currently defined) and cannot make the elections provided for under sections 150, 156 and 228.

Section 128 and the definitions "closely related group" and "qualifying subsidiary" are amended to move the registration and residency requirements, currently in section 128 and the definition "qualifying subsidiary", to the definition "closely related group" in subsection 123(1). The effect of this change is that the determination of whether a corporation is a qualifying subsidiary and whether two corporations are closely related to each other will be based on the degree of share ownership of the corporations, and of other corporations in the ownership structure, without reference to the registration or residency status of any of those corporations. However, while corporations that are non-resident and/or non-registrant can be closely related to one another, only those closely related corporations that are both registrants and resident in Canada can be members of a closely related group (as defined in subsection 123(1)) and be party to those elections open to members of a closely related group. The impact of these amendments in the example above is that CanCo1, CanCo2, NR1, NR2 and NR3 are now all closely related to one another under amended section 128, but only CanCo1 and CanCo2 are members of a closely related group under the amended definition of that expression.

The definition "closely related group" is also amended to include two deeming provisions that apply for the purposes of the definition "closely related group". These provisions that are currently in section 128 are the provision in subsection 128(1) deeming a non-resident insurer with a permanent establishment in Canada to be a resident in Canada and the provision in paragraph 128(3)(*a*) deeming a credit union and a member of a mutual insurance group to each be a registrant. These provisions are correspondingly deleted from section 128. This change has no effect on the ability of a non-resident insurer, credit union or member of a mutual insurance group to be a member of a closely related group.

The amendments to definition "closely related group" are deemed to have come into force on Announcement Date.

Subclauses 1(2) and (3)

Definition "basic tax content"

ETA
123(1)

The definition "basic tax content" provides that the basic tax content of a person's property is generally the amount of tax under Part IX that the person was required to pay on the property and improvements to it, after deducting any amounts (other than input tax credits) that the person was entitled to recover by way of rebate, refund, remission or otherwise and after taking any depreciation in the value of the property into account. The basic tax content includes not only tax that was actually paid but also the tax that otherwise would have been payable when the property (or improvements to the property) was last acquired if not for subsection 153(4) of the Act or section 167 of the Act or the fact it was acquired or brought in for consumption, use or supply exclusively in the course of commercial activities.

Subparagraph (iii) of the description of A in paragraph (*a*) and subparagraph (iv) of the description of J in paragraph (*b*) of the definition "basic tax content" are amended to provide that the basic tax content of a property also includes tax that otherwise would have been payable, in the absence of new section 167.11 of the Act, when the property (or improvements to the property) was last acquired.

The amendments to the definition "basic tax content" are deemed to have come into force on June 28, 1999.

Subclause 1(4)

Definition "financial service"

ETA
123(1)

Services that meet the definition "financial service" in subsection 123(1) are generally exempt under the GST/HST. A service will meet the definition "financial service" if it first falls within any of paragraph (*a*) to (*m*) of the definition and is not then excluded by any of paragraphs (*n*) to (*t*) of the definition.

New paragraph (*r.2*) is added to the definition to clarify that debt collection services are not included in the definition "financial service" and that, even if a debt collection service falls within paragraphs (*a*) to (*m*) of this legislative definition, it is specifically excluded from that definition by new paragraph (*r.2*).

New paragraph (*r.2*) applies to debt collection services that are rendered pursuant to an agreement between the person agreeing to provide the service (who may or may not be the person actually rendering the service) and another person other than the debtor. It provides that a debt collection service includes the actual collection of a debt as well as all other activities related to debt collection, such as attempting to collect the debt (even if unsuccessful), arranging for the collection or attempted collection of a debt, negotiating the payment or forgiveness of all or part of a debt, and realizing on, or attempting to realize on, security provided in respect of a debt. Debt collection services include any action to collect an amount due, even if the debtor is not in default at the time action is taken.

Excluded from new paragraph (*r.2*), and, therefore, not affected by this amendment, are services, such as "NSF" (Not Sufficient Funds) cheque fees, which are provided under an agreement between the debtor and another person, such as a creditor. Also excluded is a service that solely consists of accepting payment from a person (usually the debtor) of all or part of an account. An example of such a service would be a deposit-taking institution that accepts utility bill payments from a utility's customers and then passes on these payments, along with payment information, to the utility company. In order to be excluded from paragraph (*r.2*), the person accepting the payment of accounts must not have, as its principal business, the collection of debt. As well, the person must not have any authority, under its agreement with the creditor or other client, to take any other debt collection action, such as attempting to collect any part of the account or realizing or attempting to realize on security given for the account.

New paragraph (*r.2*) applies to a debt collection service rendered under an agreement for a supply if any consideration for the supply becomes due, or is paid without becoming due, after Announcement Date. It also applies to a supply in respect of which all of the consideration became due, or was paid, on or before Announcement Date, unless on or before that day the supplier did not charge, collect or remit any amount as of or on account of tax in respect of any supply of a debt collection service where that supply is made under the agreement for the supply between the supplier and its client.

As a result, new paragraph (*r.2*) may apply in the situation where, under an agreement, there are many supplies that include a debt collection service (e.g., in the situation where section 136.1 of the Act applies) and the consideration became due or was paid on or before Announcement Date for some of these supplies but not for others. In that situation, if tax was charged, collected or remitted on any of these supplies for which all of the consideration became due, or was paid, before Announcement Date, new paragraph (*r.2*) applies to every supply made under that agreement. If, however, on or before that day, tax had not been charged, collected or remitted in respect of any of these supplies, then new paragraph (*r.2*) only applies to those supplies in respect of which consideration becomes due, or is paid, after that day.

Subclause 1(5)

Definition "qualifying subsidiary"

ETA
123(1)

The definition "qualifying subsidiary" in subsection 123(1) of the Act is relevant for purposes of the definition of closely related corporations in section 128 of the Act. The definition "qualifying subsidiary" is amended to delete the requirement that a qualifying subsidiary be resident in Canada, as this residency requirement is now contained in the amended definition "closely related group" in subsection 123(1). These changes are further explained in the commentary on definition "closely related group".

The amendments to definition "qualifying subsidiary" are deemed to have come into force on Announcement Date.

Subclause 1(6)

Definition "Superintendent"

ETA
123(1)

Subsection 123(1) of the Act is amended to add the definition "Superintendent". The definition provides that "Superintendent" means the Superintendent of Financial Institutions appointed pursuant to the *Office of the Superintendent of Financial Institutions Act*. The Superintendent may make orders authorizing a foreign bank to become an authorized foreign bank permitted to establish a branch in Canada to carry on banking business in Canada. Only transfers of property or services made pursuant to an authorized foreign bank reorganization that has been approved by the Superintendent qualify for the tax-free rollover election provided by new section 167.11 of the Act.

New definition "Superintendent" is deemed to have come into force on June 28, 1999.

Clause 2

Closely Related Corporations

ETA
128

Section 128 of the Act contains rules for determining whether two corporations are considered to be "closely related" for purposes of Part IX of the Act. This determination is relevant for determining whether a corporation can be a member of a closely related group (as defined in subsection 123(1) of the Act) and thus eligible to make an election under section 150 of the Act or 156 of the Act, which effectively exempt or treat as zero-rated respectively transactions between members of the closely related group. It is also relevant for determining whether a corporation is eligible to file joint applications to offset one corporation's refunds against another's tax owing.

Subsection 128(1) provides that two corporations are considered to be closely related if they are registrants and residents in Canada and if there is a degree of common ownership of at least 90 per cent. Subsection 128(1) is amended to remove the requirement that the two corporations both be registrants resident in Canada to be considered closely related. However, in respect of the concept of closely related group, this requirement still exists and is now contained in the amended definition "closely related group" in subsection 123(1). This change is further explained in the commentary on that definition.

Subsection 128(2) provides that where two corporations are closely related to the same corporation under subsection 128(1), or would be if all the corporations were Canadian residents, these two corporations are considered to be closely related to each other. Subsection 128(2) is amended to delete the words "or would be so related if all the corporations were resident in Canada" given that those words are no longer needed as amended subsection 128(1) no longer requires that two corporations both be resident in Canada in order to be closely related to each other. Amended subsection 128(2) now simply provides that two corporations are closely related to each other if they are each closely related under subsection 128(1) to a third corporation.

Existing subsection 128(3) contains deeming rules, which apply for the purposes of determining if two corporations are closely related to one another under section 128. Subsection 128(3) is amended to delete paragraph (*a*) which deems credit unions and members of a mutual insurance group to be registrants for the purposes of section 128. Since a corporation no longer needs to be a registrant in order to be closely related to another corporation under amended section 128, this deeming rule is no longer needed. Subsection 128(3) now only deems an investment fund that is a member of a mutual insurance group to be a corporation.

The amendments to section 128 are deemed to have come into force on Announcement Date.

Clause 3

Election for Closely Related Persons

ETA
156

Section 156 of the Act allows supplies between certain members (defined as "specified members") of a closely related group of corporations and partnerships resident in Canada to be effectively treated as zero-rated supplies if those member corporations and partnerships are all engaged exclusively in commercial activities (and, therefore, are entitled to fully recover any tax paid on purchases from other members in any event). This is achieved by specified members electing to treat certain supplies between them as having been made for nil consideration. The effect is that the members need not account for otherwise fully recoverable tax on the supplies.

Subclauses 3(1) and (2)

Definitions

ETA
156(1)

Subsection 156(1) of the Act provides definitions that apply for the purposes of section 156. The amendments to section 156 modify the existing definitions "qualifying group" and "specified member" and add new definitions "distribution", "qualifying member" and "temporary member".

These amendments to subsection 156(1) are deemed to have come into force on Announcement Date.

Definition "qualifying group"

Existing definition "qualifying group" refers to a group whose members are entitled to make an election under subsection 156(2) of the Act if they qualify as "specified members". A qualifying group means a "closely related group", as defined in subsection 123(1) of the Act as being a group of corporations each member of which is a registrant, resident in Canada and closely related (generally, 90 per cent or more common ownership) to each other within the meaning of section 128 of the Act. A qualifying group also means a group consisting of Canadian partnerships, or of Canadian partnerships and corporations resident in Canada, that are all registrants and are closely related to one another, according to the rules set out in subsections 156(1.1) and (1.2).

The definition "qualifying group" is amended so that a corporation no longer has to be resident in Canada or a registrant in order to be a member of a qualifying group. As well, in the case of a Canadian partnership, it no longer has to be a registrant, though members of the partnership still have to be resident in Canada, in order to be a member of a qualifying group. These registration and residency requirements are instead moved to the new

definition "qualifying member" in subsection 156(1), which determines who is eligible to make the election under subsection 156(2). These changes are further explained in the commentary on that definition.

Definition "specified member"

Existing definition "specified member" refers to persons that are eligible to make an election under subsection 156(2) of the Act. Currently, the meaning of specified member is limited to corporations and partnerships that are members of a qualifying group of closely related corporations and partnerships and are not party to an election under subsection 150(1) of the Act. Also, the members must meet the condition that all or substantially all of their property was last manufactured, produced, acquired or imported for consumption, use or supply exclusively in the course of their commercial activities or, if they have no property (other than financial instruments), all or substantially all of their supplies were taxable supplies.

The definition "specified member" is amended to provide that a specified member of the qualifying group (as defined in subsection 156(1)) includes a temporary member (as defined in subsection 156(1)) of the group as well as a qualifying member (as defined in subsection 156(1)). The effect of the change is that a corporation which exists to receive a supply made in contemplation of a distribution made in the course of a reorganization described in subparagraph 55(3)(*b*)(i) of the *Income Tax Act*, and which prior to that supply never carried on business or owned property, can qualify as a specified member and make an election under subsection 156(2). However, a temporary member only qualifies as a specified member during the course of a reorganization. Once the reorganization is completed, the temporary member must meet the requirements of being a qualifying member or else it will cease to be a specified member and any election made by it under subsection 156(2) will cease to exist.

The conditions that were in existing definition "specified member" are now contained in new definition "qualifying member".

Definition "distribution"

New definition "distribution" has the same meaning as under subsection 55(1) of the *Income Tax Act*. A distribution is the direct or indirect transfer of property of a corporation to one or more of its corporate shareholders such that each corporation that receives property on the distribution receives its pro rata share of each type of property owned by the distributing corporation immediately before the distribution.

Definition "qualifying member"

New definition "qualifying member" has a similar meaning to the existing definition "specified member". Therefore, a "qualifying member" is a corporation or partnership that is a member of a qualifying group of closely related corporations and Canadian partnerships and that is not a party to an election under subsection 150(1) of the Act. The member must also meet the condition that all or substantially all of its property was last manufactured, produced, acquired or imported for consumption, use or supply exclusively in the course of its commercial activities or, if it has no property (other than financial instruments), all or substantially all of its supplies were taxable supplies. However, the definition adds additional requirements, not contained in the existing definition "specified member", that the corporation or partnership be a registrant and that it be either a corporation resident in Canada or a Canadian partnership. The addition of residency and registration requirements is necessary as the same requirements are concurrently being removed from the definition "qualifying group" in subsection 156(1) of the Act and from subsections 156(1.1) and 156(1.2).

The effect of the amendments to this definition is that a corporation or Canadian partnership can be a member of qualifying group if it meets the ownership requirements (i.e., to have at least 90 per cent ownership of the corporation's full voting shares or to hold all or substantially all of the interest in the partnership) despite its

residency (in the case of a corporation) or its registration status. However, only those corporations or partnerships in the qualifying group that are both registrants and that are either corporations resident in Canada or Canadian partnerships qualify as qualifying members, which allows them to meet the amended definition "specified member" in subsection 156(1) and to make the election under subsection 156(2). As a result, corporations and Canadian partnerships that meet these residency and registration requirements and that form part of a 90 per cent or more common ownership group, but do not currently qualify as "specified members" because one or more of the corporations or partnerships in the ownership structure do not meet these residency and registration requirements, are now qualifying members and therefore specified members. These amendments parallel similar amendments to the definitions "closely related group" and "qualifying subsidiary" and to section 128 of the Act.

Definition "temporary member"

New definition "temporary member" refers to a corporation that exists to receive a transfer of property from an existing corporation as part of a transaction undertaken to comply with the requirements of paragraph 55(3)(*b*) of the *Income Tax Act* (a "butterfly" transaction). This type of corporation cannot currently qualify as a "specified member" (as defined in existing subsection 156(1) of the Act) and cannot make the election in subsection 156(2) in respect of this transfer since, prior to receiving it, it would not have had any property (other than possibly financial instruments) or made taxable supplies.

Amendments to section 156 allow this corporation, if it falls within the definition of temporary member, to qualify as a specified member (as defined in subsection 156(1)) and to make the election in respect of a supply it receives that is made in contemplation of a distribution made in the course of a reorganization described in subparagraph 55(3)(*b*)(i) of the *Income Tax Act*. To qualify as a temporary member, a corporation must be resident in Canada and a registrant for the GST/HST. Further, it must receive the supply from a distributing corporation in contemplation of a distribution and its shares must be transferred in the course of the distribution. It must also be a member of the same qualifying group as the distributing corporation making the supply. In addition, the corporation cannot be a party to an election made under subsection 150(1) of the Act and, prior to receiving the supply, must not have had any business activities or owned any property other than financial instruments. Finally, if a corporation meets the requirement of being a qualifying member (as defined in subsection 156(1)), it cannot also be a temporary member at the same time.

Subclauses 3(3) to (9)

Closely Related Persons

ETA
156(1.1)

Subsection 156(1.1) of the Act contains rules for determining whether two Canadian partnerships, or a Canadian partnership and a corporation resident in Canada, are closely related for the purposes of section 156. Paragraph 156(1.1)(*a*) provides the rules for determining whether two Canadian partnerships are closely related. Paragraph 156(1.1)(*b*) provides the rules for determining whether a Canadian partnership is closely related to a corporation resident in Canada. In all cases, however, both persons must be registrants.

Subsection 156(1.1) is amended to remove the requirement that a person be a registrant, and the requirement that a corporation be a resident in Canada, in order to be closely related for the purposes of section 156. These residency and registration requirements are moved to the definition "qualifying member" in subsection 156(1) and are explained in the commentary on that definition.

These amendments to subsection 156(1.1) are deemed to have come into force on Announcement Date.

Subclause 3(10)

Persons Closely Related to the Same Person

ETA
156(1.2)

Subsection 156(1.2) of the Act provides that, where two persons are closely related to the same corporation or partnership under subsection 156(1.1), or would be so related if the corporation or each member of the partnership were resident in Canada, the two persons are considered closely related to each other for the purposes of section 156.

Subsection 156(1.2) is amended to remove the reference allowing the corporation to be considered resident in Canada for the purposes of determining if the two persons are closely related to the corporation. This reference is no longer needed, as amended subsection 156(1.1) no longer requires that a corporation be resident in Canada in order to be closely related to another corporation or to a Canadian partnership. Subsection 156(1.2) now simply provides that two persons are closely related to each other for the purposes of section 156 if they are each closely related under subsection 156(1.1) to the same corporation or partnership, or if they would be so related to that partnership if each member of that partnership were resident in Canada.

These amendments to subsection 156(1.2) are deemed to have come into force on Announcement Date.

Subclause 3(11)

Election for Nil Consideration

ETA
156(2) and (2.1)

Existing subsection 156(2) of the Act allows certain members (defined as "specified members" in subsection 156(1)) of a closely related group of corporations and/or Canadian partnerships to elect to treat certain taxable supplies between them as having been made for nil consideration. The effect is that the members need not account for otherwise fully recoverable tax on the supplies. Subsection 156(2) excludes from the application of the election supplies by way of sale of real property and supplies of property or services that are not acquired for consumption, use or supply exclusively in the course of the recipient's commercial activities. Subsection 156(2) is amended to delete these exclusions from the section. These exclusions are now contained in new subsection 156(2.1).

The amendments also add new subsection 156(2.1) of the Act, which provides exclusions from the application of the election under section 156 of the Act. Paragraphs 156(2.1) (*a*) and (*b*) contain the exclusions removed from existing subsection 156(2). Paragraph (*c*) contains a new exclusion that only applies to supplies where the recipient is a temporary member (as defined in subsection 156(1)). This paragraph provides that, in the case of these supplies, the election applies only to supplies received by the temporary member that are made in contemplation of a distribution made in the course of a reorganization described in subparagraph 55(3)(*b*)(i) of the *Income Tax Act*.

These amendments apply to supplies made on or after Announcement Date.

Clause 4

Supply to Authorized Foreign Bank

ETA
167.11

New section 167.11 of the Act sets out rules that apply to certain supplies of property or services, made to a foreign bank by a related Canadian corporation, where the supply is made in order for the foreign bank to establish a branch and commence business in Canada as an authorized foreign bank (as defined in subsection 167.11(1) of the Act). This section permits, in certain circumstances, an otherwise taxable sale of property or a service to be made without tax applying if both parties to the transaction so elect under the rules and conditions set out in this section.

New section 167.11 is deemed to have come into force on June 28, 1999.

Subsection 167.11(1) - Definitions

Subsection 167.11(1) of the Act adds new definitions that are used throughout section 167.11.

Definition "authorized foreign bank"

New definition "authorized foreign bank" has the same meaning as under section 2 of the *Bank Act*. An authorized foreign bank is a foreign bank that has been permitted by the Superintendent of Financial Institutions to establish and carry on banking business through a branch in Canada.

Definition "foreign bank branch"

New definition "foreign bank branch" means a branch as defined in paragraph (*b*) of the definition "branch" in section 2 of the *Bank Act* in respect of an authorized foreign bank. That definition provides that a branch of an authorized foreign bank means an agency, the principal office or any other office of an authorized foreign bank where that bank carries on its Canadian banking business.

Definition "qualifying supply"

New definition "qualifying supply" means a supply made as part of a foreign bank reorganization where a foreign bank, which previously conducted business in Canada through a Canadian subsidiary but which has since been authorized by the Superintendent of Financial Institutions to establish a branch of the foreign bank in Canada, transfers property or services from a subsidiary to the branch. The definition "qualifying supply" is relevant in determining which supplies qualify for the election, provided for in subsection 167.11(2), which allows a tax-free rollover of certain property and services transferred to the foreign bank branch (as defined in this subsection).

In order for a supply to be a qualifying supply, it must be a supply of property, or of a service, made in Canada under an agreement for the supply. As well, the recipient must be a foreign bank that is, or has filed an application for an order under subsection 524(1) of the *Bank Act* with the Superintendent of Financial Institutions to become, an authorized foreign bank and the supplier must be a corporation resident in Canada that is related to that foreign bank. Also, the supply must be made after June 27, 1999 (the day on which the foreign bank branching legislation contained in the *Bank Act* came into force) and must be made before the day that is one year after the day on which the Act enacting this definition receives royal assent. However, if, during the one-year period after the date of royal assent, the Superintendent of Financial Institutions makes an order

under subsection 534(1) of the *Bank Act* approving the foreign bank's application to commence and carry on business in Canada, then the supply can be made up to the day that is one year after the date of that order.

In addition, to be a qualifying supply, the foreign bank must acquire the property or service for consumption, use or supply for the purpose of the establishment and commencement of business in Canada as an "authorized foreign bank" at one of its branches. Moreover, if the related corporation is a registrant at the time the related corporation and the foreign bank enter into the agreement for the supply, the foreign bank must also be a registrant at that time. New paragraph 240(3)(*e*) of the Act permits a foreign bank that will enter into an agreement to receive a supply which would meet the requirements of the definition "qualifying supply" but for the foreign bank not being a registrant to register for the GST/HST. This ensures that a foreign bank that receives a qualifying supply from a registered related Canadian corporation has the opportunity to make the election under s. 167.11(2) in respect of the qualifying supply even if it is not otherwise permitted by section 240 to register.

Subsection 167.11(2) - Supply of Assets

Subsection 167.11(2) of the Act provides that where a corporation resident in Canada makes a qualifying supply (as defined in subsection (1)) to a foreign bank that is related to the corporation, the corporation and the foreign bank may make a joint election which allows a tax-free rollover of certain property and services supplied in the authorized foreign bank reorganization. As a consequence of the election, the related corporation and the foreign bank are deemed to have respectively made and received a separate supply of each property and service that is made under the agreement for the qualifying supply, notwithstanding that these properties and services may be supplied together in a single supply. When attributing the consideration for the qualifying supply to each property or service, no amount should be attributed to goodwill unless section 167.1 of the Act applies to the qualifying supply. If section 167.1 does not apply, any amount that has been allocated to goodwill should instead be attributed to a taxable supply of intangible personal property, in which case subparagraph 167.11(3)(*a*)(vi) applies to that supply. Moreover, subsections (3) to (6) apply to each deemed supply of property or service to determine the tax, if any, that is payable, any adjustments to net tax that may be made by the foreign bank and the impact of the election on the basic tax content of the transferred property. Under subsection (7), the election is valid only if the foreign bank files the election within the time period and under the conditions provided for in that subsection.

Subsection 167.11(3) - Effect of Election

Subsection 167.11(3) of the Act sets out further rules that apply when a foreign bank and a related corporation resident in Canada make the joint election referred to in subsection (2) in respect of a qualifying supply (as defined in subsection (1)) of property or a service.

Paragraph 167.11(3)(*a*) provides that tax is not payable on the deemed separate supply of property or a service that is made under the agreement for the qualifying supply. However, there are some exclusions from this rule similar to the existing exclusions contained in subsection 167(1.1) of the Act respecting the election for a tax-free supply of assets in the case of the sale of a business. Specifically, subparagraphs 167.11(3)(*a*)(i), (iii) and (iv) are similar to the existing subparagraphs 167(1.1)(*a*)(i), (ii) and (iii) in providing that tax continues to be payable on taxable supplies of either services to be rendered by the supplier (i.e., the related corporation), property by way of lease, license or similar arrangement by the related corporation or in the case of a taxable sale of real property where the foreign bank recipient is not a registrant.

In addition, subparagraph 167.11(3)(*a*)(ii) provides that tax is payable on taxable supplies of services if paragraph 167(1)(*a*) does not apply to the qualifying supply. Paragraph 167(1)(*a*) does not apply if the related corporation making the taxable supply of services is not making a supply of a business, or a part of a business, and if the foreign bank recipient is not acquiring ownership, possession or use of all or substantially all of the property that it would need to carry on the transferred business or part as a business.

Subparagraph 167.11(3)(*a*)(v) excludes from the relieving rule a taxable supply of property or a service that was previously made under an agreement for a qualifying supply if no tax was payable in respect of that previous supply by reason of subsection 167.11(3). As a result, property or a service may only be transferred once on a tax-free basis under these asset rollover provisions.

Also, subparagraph 167.11(3)(*a*)(vi) excludes from the relieving rule a taxable supply of intangible personal property (other than capital property) if there is a greater than 10% difference between the extent (expressed as a percentage of the total use of the property by the related corporation supplier) to which the related corporation used the property in commercial activities immediately before the qualifying supply is made and the extent (expressed as a percentage of the total use of the property by the foreign bank recipient) to which the foreign bank used the property in commercial activities immediately after the qualifying supply is made. In other words, a taxable supply of intangible personal property is taxable if there is a significant (greater than 10%) decrease in the use of the property in commercial activities as a result of the transfer.

Paragraphs 167.11(3)(*b*) and (*c*) deem property that is supplied under the agreement for the qualifying supply, that was capital property of the related corporation supplier and that is acquired for use as capital property by the foreign bank recipient, to have been acquired by that foreign bank for use exclusively in commercial activities (where the supply would otherwise be taxable) or for use exclusively in non-commercial activities (where the supply would otherwise be exempt). These rules are similar to the deeming rules that apply to capital property under subsection 167(1.1) in the case of a supply of a business.

The purpose of these rules is to ensure that, if the foreign bank uses the property in commercial activities to a lesser extent than the related corporation last used the property (i.e., the foreign bank would have been entitled to a lesser input tax credit than the related corporation), the change-in-use rules in Subdivision d of Division II will require the foreign bank to self-assess tax. The foreign bank may conversely be entitled to an input tax credit if the foreign bank uses the property in commercial activities to a greater extent than the related corporation last used the property. Further information can be found in the commentary on new subsections 205(4.1) and (5.1) of the Act.

Finally, paragraph 167.11(3)(*d*) provides that, if property that was used otherwise than as a capital property by the related corporation supplier before being supplied under the agreement for the qualifying supply, the foreign bank recipient is deemed to have acquired the property for consumption, use or supply in the course of commercial activities and otherwise than as capital property. This rule only applies if, in the absence of the election referred to in subsection (2), tax would have been payable by the foreign bank in respect of the supply of the property. The purpose of this rule is to trigger change-in-use rules under section 196.1 of the Act, if for example, there is an appropriation of property by the foreign bank for use as capital property that was previously inventory of the related corporation.

Subsection 167.11(4) - Basic Tax Content

Subsection 167.11(4) of the Act sets out rules that apply to determine the basic tax content of property acquired by a foreign bank recipient, under an agreement for a qualifying supply if the property is, immediately before the time the qualifying supply is made, capital property of a related corporation supplier. These rules apply where the property is acquired from the related corporation on a tax-free basis because the joint election referred to in subsection 167.11(2) is made in respect of the qualifying supply. These basic tax content rules may be triggered if the foreign bank is required to pay tax, or may be entitled to claim an input tax credit, if the property is capital property and its extent of use in commercial activities changes following the supply.

The basic tax content, defined in subsection 123(1) of the Act, is generally the amount of tax under Part IX that the person was required to pay on the property and improvements to that property after deducting any amounts (other than input tax credits) that the person was entitled to recover by way of rebate, refund, remission or

otherwise and after taking any depreciation in the value of the property into account. In the case of a supply of property, in the absence of special rules, the foreign bank recipient might in certain circumstances (e.g., supply of property acquired by the supplier before 1991 or property that has appreciated in value) be required to self-assess and account for tax based on the fair market value of the property, which tax could be higher than the tax the related corporation supplier originally paid. Therefore, special rules are proposed to ensure that the supply from the related corporation to the foreign bank is ignored and that the basic tax content of the transferred property remains at the time the recipient acquires the property what it was immediately before the qualifying supply was made. However, in determining the basic tax content of that property after the time the qualifying supply is made, the foreign bank must also take into account any amounts of tax payable and any other tax amounts required to be added (e.g., in the case of improvements to the property acquired by the foreign bank) or deducted under the basic tax content rules subsequent to the supply.

In order to accomplish this, subsection 167.11(4) provides a series of rules that effectively transfer the basic tax content of the property supplied under the agreement for a qualifying supply from the related corporation to the foreign bank by deeming the foreign bank to be in the shoes of the related corporation for the period between the last acquisition of the property by the related corporation and the time the qualifying supply is made.

Subsection 167.11(5) - Adjustment to Net Tax

Subsection 167.11(5) of the Act provides for an adjustment to net tax of the foreign bank in the case where a related corporation made a qualifying supply (as defined in subsection 167.11(1)) to the foreign bank but the two parties did not make the joint election under subsection 167.11(2) in respect of that supply until after the foreign bank had already paid tax on that supply. Subsection 167.11(5) provides a mechanism whereby that foreign bank can make an adjustment to its net tax to recover the tax it could have avoided paying if it had made the subsection 167.11(2) election at the time of the supply.

Subsection 167.11(5) provides an adjustment to net tax in respect of a supply of a property or a service, made under an agreement for the qualifying supply, where that supply would not be taxable by virtue of paragraph 167.11(3)(*a*) if the election referred to in subsection 167.11(2) is made. Subsection 167.11(5) applies to supplies of property or services made under an agreement for a qualifying supply, but only if that agreement is made before Announcement Date. This subsection applies to each supply of property or of a service, deemed to have been made separately under subsection 167.11(2), rather than to the qualifying supply as a whole. The amount of the adjustment to net tax that the foreign bank can make in respect of such a supply is the amount of tax the foreign bank actually paid on the non-taxable supply of the property or service minus all amounts of that tax paid, in respect of the property or service, that the foreign bank either recovered through an input tax credit claim, rebate, refund, remission or other means or could have recovered through a deduction from net tax (other than an amount determined under this subsection).

Subsection 167.11(6) - Limitation Period Where Election

Subsection 167.11(6) of the Act modifies the normal limitation period that applies for the purpose of making an assessment, reassessment or additional assessment to take into account an amount payable by a foreign bank, or an amount remittable by a related corporation, in the case where the foreign bank and the related corporation make the joint election referred to in subsection 167.11(2) in respect of a qualifying supply (as defined in subsection 167.11(1)). Subsection 167.11(6) provides that the four-years limitation period that applies solely for this purpose begins on the day that is the later of the day the foreign bank and related corporation make the joint election referred to in subsection 167.11(2) and the day the qualifying supply is made. As a result, the limitation period for an assessment, reassessment or additional assessment may be extended as a result of making the joint election where the election is made some time after the supply of property or service is made.

Subsection 167.11(7) - Validity of Election

Subsection 167.11(7) of the Act sets out conditions and time requirements for validity of the joint election referred to in subsection 167.11(2) by a foreign bank recipient and a related corporation supplier in respect of a qualifying supply (as defined in subsection 167.11(1)), including the requirement that the election be filed in prescribed form containing prescribed information. Paragraph 167.11(7)(*a*) provides that, where the foreign bank is a registrant at the time the qualifying supply is made, the joint election must be filed with the Minister of National Revenue no later than the day that is the latest of (i) the day the foreign bank was first required to file a return to report tax that would, in the absence of the provisions of section 167.11, be payable in respect of the supply of property or service made under the agreement for the qualifying supply received by that foreign bank; (ii) the day that is one year after the day the Act enacting section 167.11 receives royal assent; and (iii) any later day that the Minister may permit to file the election if the foreign bank so applies. If, instead, the foreign bank is not a registrant at the time the qualifying supply is made, paragraph 167.11(7)(*a*) provides that the joint election must be filed no later than the latest of the three days described above except that the day provided for in subparagraph (i) is the day that is one month after the end of the reporting period for which tax would, in the absence of the provisions of section 167.11, have become payable in respect of the supply of property or service supply made under the agreement for the qualifying supply received by the foreign bank.

Paragraph 167.11(7)(*b*) provides that a joint election can only be made in respect of qualifying supplies made within a one-year period. In other words, a joint election is only valid in respect of a qualifying supply if that supply is made on or before the day that is one year after the day on which the recipient has received for the first time a qualifying supply in respect of which a joint election referred to in subsection (2) has been made.

Finally, paragraph 167.11(7)(*c*) provides that the joint election referred to in subsection 167.11(2) in respect of a qualifying supply is not valid if, on or before the day the election is filed, the foreign bank has made an election under subsection 167(1) in respect of that qualifying supply. As a result, if the foreign bank and the related corporation have already chosen to make the election under subsection 167(1) in respect of the qualifying supply, they cannot then also avail themselves of the election referred to in subsection 167.11(2) particular to authorized foreign bank reorganizations.

Clause 5

Sale of Real Property

ETA
193(1)

Subsection 193(1) of the Act allows, in certain circumstances, a registrant who makes a taxable supply of real property to claim an input tax credit for previously non-recoverable tax paid by the registrant in respect of the property. The credit is equal to the amount determined by the formula A x B, where element A is the lesser of the basic tax content of the property at the time of the supply and the tax that is or would, in the absence of section 167 of the Act, be payable in respect of the taxable supply. Element B is the percentage of the total use of the property otherwise than in commercial activities of the registrant immediately before the sale.

The amendment adds a reference to new section 167.11 of the Act in element A of the formula to take into account the tax that would have been payable in the absence of that section.

The amendment is deemed to have come into force on June 28, 1999.

Clause 6

Acquisition of Assets

ETA
205

Section 205 of the Act provides that change-in-use rules for capital real property also apply to capital personal property of a financial institution in certain circumstances. For example, these change-in-use rules may apply where, in acquiring all or part of a business of a registrant, a financial institution is deemed by section 167 of the Act to have either acquired property exclusively in commercial activities or, conversely, exclusively otherwise than in the course of commercial activities. Amendments are made to section 205 consequential to the addition of new section 167.11 of the Act.

The amendments to section 205 are deemed to have come into force on June 28, 1999.

Subclause 6(1)

Acquisition of Asset by Foreign Bank

ETA
205(4.1)

New subsection 205(4.1) of the Act is similar to existing subsection 205(4) but it applies where an election has been made under section 167.11 of the Act rather than under section 167 of the Act. Subsection 205(4.1) applies if a foreign bank and a corporation related to that foreign bank make the joint election referred to in subsection 167.11(2) in respect of a qualifying supply at the time the foreign bank and the related corporation are both registrants. Subsection 205(4.1) also requires that the related corporation make a supply of capital personal property to the foreign bank under the agreement for the qualifying supply, that subsection 167.11(3) deems that foreign bank to have acquired the property for use exclusively in commercial activities and that, immediately after the transfer, the foreign bank actually uses that property as capital property but not exclusively in commercial activities.

If all these conditions are met, subsection 205(4.1) provides that subsection 193(1) of the Act, which normally only applies to sales of real property, applies to capital property supplied by a related corporation to a foreign bank, which may allow that corporation to claim an input tax credit for previously non-recoverable tax paid by that corporation. As well, the change-in-use rules in subsections 206(4) and (5) of the Act apply to the capital personal property so acquired by the foreign bank requiring the foreign bank to self-assess and pay tax. It should be noted that while subsections 206(4) and (5) normally only apply to capital real property or, in the case of a financial institution, to personal property having a cost in excess of $50,000, there is no cost threshold to the application of subsections 206(4) or (5) where they apply to personal property by virtue of the application of subsection 205(4.1).

Subclause 6(2)

Acquisition of Asset by Foreign Bank

ETA
205(5.1)

New subsection 205(5.1) of the Act is similar to existing subsection 205(5) but applies where an election has been made under section 167.11 of the Act rather than under section 167 of the Act. Subsection 205(5.1) applies if a foreign bank and a corporation related to that foreign bank make the joint election referred to in subsection 167.11(2) in respect of a qualifying supply at the time the supplier and the registrant are both registrants. Subsection 205(5.1) also requires that a supply of capital personal property by the related corporation to the foreign bank be made under the agreement for the qualifying supply, that subsection 167.11(3) deems that foreign bank to have acquired the property for use otherwise than in commercial activities and that, immediately after the transfer, the foreign bank actually uses that property as capital property in commercial activities.

If all these conditions are met, subsection 205(5.1) provides that the change-in-use rules in subsection 206(2) of the Act apply to the foreign bank which may entitle that foreign bank to claim an input tax credit. It should be noted that while subsection 206(2) normally only applies to capital real property or, in the case of a financial institution, to personal property having a cost in excess of $50,000, there is no cost threshold to the application of subsection 206(2) where it applies to personal property by virtue of the application of subsection 205(5.1).

Clause 7

Registration Permitted

ETA
240(3)

Subsection 240(3) of the Act permits persons engaged in a commercial activity in Canada and certain other specified persons to apply to become registered for purposes of the GST/HST.

Subsection 240(3) is amended to add new paragraph (*e*), which extends voluntary registration to a foreign bank that receives a qualifying supply (as defined in subsection 167.11(1) of the Act), or that receives a supply which would meet the definition of "qualifying supply" contained in subsection 167.11(1) if the foreign bank were a registrant at the time of the agreement for that supply. The registration is permitted provided that the foreign bank recipient files a joint election under subsection 167.11(2) with the Minister of National Revenue in respect of the qualifying supply within the time limit set out in paragraph 167.11(7)(*a*).

Subsection 240(3) is also amended to add new paragraph (*f*), which permits a corporation in certain circumstances to register for the purposes of GST/HST. The corporation must be a corporation that would qualify as a temporary member (as defined in subsection 156(1) of the Act) if the corporation met all the requirements of that definition other than the requirement that the corporation be a registrant. This amendment allows this corporation to meet the registration requirement for being a temporary member, which in turn may, if the other conditions contained in section 156 are met, permit the corporation to make an election under that section to receive a supply on a GST/HST-free basis. The supply must be made in contemplation of a distribution made in the course of a reorganization described in subparagraph 55(3)(*b*)(i) of the *Income Tax Act*. This corporation may apply to be registered before it receives that supply so long as it does in fact subsequently receive that supply.

The amendment adding new paragraph 240(3)(*e*) is deemed to have come into force on June 28, 1999, and the amendment adding new paragraph 240(3)(*f*) is deemed to have come into force on Announcement Date.

Clause 8

Non-registrant Sale of Real Property

ETA
257(1)

Subsection 257(1) of the Act allows a non-registrant who makes or is deemed to make a taxable sale of real property to claim a rebate to recover previously non-recoverable tax paid by the non-registrant in respect of the property. The rebate is equal to the lesser of the basic tax content of the property at the time of the sale and the tax that is or would, in the absence of section 167 of the Act, be payable in respect of the sale.

An amendment is made to paragraph 257(1)(*b*), consequential to the addition of new section 167.11 of the Act, to add a reference to section 167.11. As a result, the rebate under subsection 257(1) is equal to the lesser of the basic tax content of the property at the time of the sale and the tax that is or would, in the absence of section 167 or 167.11, be payable in respect of the sale.

The amendment to paragraph 257(1)(*b*) is deemed to have come into force on June 28, 1999.

Clause 9

Imported Goods Relieved Under Exporters of Processing Services Program

ETA
Schedule VII, section 8.3

Section 8.1 of Schedule VII to the Act sets out the conditions for a registrant to obtain GST/HST relief on certain importations of goods that are imported solely for the purposes of having services performed that are supplied by the registrant to a non-resident person. One of those conditions, set out in subparagraph 8.1(*e*)(iii), is that the registrant not be closely related to that non-resident person or to any non-resident owner of the imported goods or of the processed products. Section 8.3 of the Schedule provides that a non-resident referred to in section 8.1 is considered to be closely related to the registrant where they would be closely related to each other under section 128 of the Act if the non-resident were a registrant resident in Canada.

Schedule VII is amended to repeal section 8.3. This amendment is consequential to amendments to section 128 of the Act, which removes the requirement that two corporations be registrants and resident in Canada in order to be closely related to each other.

The amendment to Schedule VII is deemed to have come into force on Announcement Date.

Draft Amendments to the Closely Related Corporations (GST/HST) Regulations

Closely Related Corporations (GST/HST) Regulations
3

The *Closely Related Corporations (GST/HST) Regulations* prescribe corporations to be closely related for purposes of the GST/HST. Existing section 3 of the Regulations provides that, where the requirements of the section are met, a corporation (referred to as the "other corporation") is a prescribed corporation, for the purposes of paragraph 128(1)(*b*) of the *Excise Tax Act*, in relation to a particular corporation where the other corporation is a registrant resident in Canada.

Section 3 is amended to remove the requirement that the other corporation be a registrant resident in Canada. This amendment is consequential to similar amendments to section 128, which remove the requirement that a corporation be a registrant resident in Canada in order to be closely related to another corporation.

The amendments are deemed to have come into force on Announcement Date.

Draft Amendments to the Financial Services (GST/HST) Regulations

Financial Services (GST/HST) Regulations
4

The *Financial Services (GST HST) Regulations* prescribe services that are either included in or excluded from the definition "financial service" contained in subsection 123(1) of the *Excise Tax Act* (the "Act"). Existing subsection 4(2) of the Regulations prescribes services for the purposes of paragraph (*t*) of the definition "financial service" which are not included in that definition. Existing subsection 4(3) then carves out from paragraph (*t*) certain services described in subsection 4(2). Among these services are services with respect to certain financial instruments where the services are supplied by a person closely related to a person at risk or where the issuance, renewal, variation or transfer of the instrument is performed for a person at risk or a person closely related to that person.

Paragraphs (*b*) and (*c*) of subsection 4(3) are amended to replace references to a person that is closely related with references to a person that is a member of the same closely related group. These amendments are consequential to amendments made to section 128 of the Act and to the definition "closely related group" in subsection 123(1).

The amendments apply to supplies made on or after Announcement Date.